

No. 16459

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

RALPH MEYER,

Appellant,

vs.

IRVING I. BASS, Trustee in Bankruptcy of the Estate of VENSEP, INC.,
etc., Bankrupt, and DIVISION OF LABOR LAW ENFORCEMENT.

Appellees,

IRVING E. BASS, Trustee in Bankruptcy of the Estate of VENSEP,
INC., Bankrupt,

Appellant,

vs.

RALPH MEYER,

Appellee.

REPLY BRIEF OF APPELLANT RALPH MEYER.

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REPLY BRIEF OF APPELLANT RALPH MEYER.

I.

Appellant's Petition for Review of the Referee's Order of October 23, 1958 Was Properly Entertained.

In the Order on Review of Referee's Order of October 23, 1958 [Tr. of R., p. 61] the court stated:

“although petitioner failed to file a petition for review within the time prescribed by Section 39 c of the Act (see 11 U. S. C., 67 c), this Court exercising equitable powers may, and under the circumstances here should, entertain the present petition for review (*In re Steinberg*, 138 Fed. Supp. 462, S. D., Cal., 1956).”

“We do not think that Section 39, Subd. c. was intended to be a limitation on the sound discretion of the bankruptcy court to permit the filing of petitions for review after the expiration of the period. . . . The review out of time of the Commissioner’s Orders is then a matter for discretion of the District Court.”

Pfister v. Northern Illinois Finance Co., 317 U. S. 144, 63 S. Ct. 133.

A petition for review from an order of a referee in bankruptcy, even though the time for the filing thereof has expired, *should* be heard by the court.

In re Steinberg, 138 Fed. Supp. 462 (S. D., Calif.).

It is a matter resting within the sound discretion of the District Court whether a petition for review of a referee’s order should be entertained where the petition is filed late.

In re F. P. Newport Corporation, 137 Fed. Supp. 58 (S. D., Calif.);

In re C. & P. Co., 63 Fed. Supp. 400 (S. D., Calif.).

Appellees cite (Appellees’ Reply Brief, p. 6) *Bookey v. King*, 236 F. 2d 871 for the proposition that the filing of the petition for review within the ten day period is “imperative.” In this case the petition for review was filed eight months late and the court then proceeded to discuss the facts of the particular case and decided that there was no adequate excuse for the late filing of the petition.

Appellees refer (Appellees’ Reply Brief p. 6) to *In re Sadler*, 104 Fed. Supp. 886 as authority for stating that,

“substantial justification” must be shown to permit the filing of a petition for review out of time. There is no indication from an examination of this case that the Court applied any principles different from those relied on in the authorities cited above, but rather exercised its discretion in deciding whether to allow the late filing of the petition for review. The imposition of a requirement of “substantial justification” for the filing of a late petition would not be warranted on the basis of this case; and, if such a requirement were proper it would add nothing to the settled law on this subject which places the decision within the discretion of the District Court as to allowing the filing of a late petition for review.

In the case of *In re Robinson*, 42 Fed. Supp. 342 (Appellees’ Reply Brief p. 7), the Court discussed the merits of the petition and its finding against the petitioner *on the merits* was the basis of its decision.

The District Court properly exercised its equitable powers in allowing the petition for review to be filed herein.

II.

A Liquor License Has No Value Unless It Can Be Transferred and Sold. The Value of a Liquor License, From the Time of Its Issuance, Cannot Have a Value in Excess of the Sales Price Minus the State Taxes Set Forth in Business & Professions Code, Section 24049 Unpaid at the Date of Sale.

Appellees argue (Appellees’ Reply Brief pp. 7-10) that the subject liquor license was property which became an asset of the Assignee’s Estate subject to the lien for wages. However, Appellees admit (Appellees’ Reply Brief p. 7) that, “a liquor license is merely a privilege so far

as the relations between the licensee and the state are concerned"; but Appellees state (Appellees' Reply Brief p. 7) that it is property, which has value *and may be sold*, as between a licensee and a third person.

A liquor license is a document which permits the licensee to do that which would otherwise be unlawful.

Irvine v. State Board of Equalization, 40 Cal. App. 2d 280.

The piece of paper has no value in and of itself. The liquor license has value to some entity which wants it and is willing to pay money for the intangible right which it represents, *i.e.*, permission by the State to sell alcoholic beverages. Of course, the prospective purchaser, in order to use the license, must have the license transferred to him and placed in his name. Therefore, any value which might be placed on the license is dependent and conditioned upon the transfer of the right which the license represents to the purchaser.

The Assignee, Appellant herein, therefore, merely had custody of a piece of paper without value until the license could be transferred and sold to a third person. But, a sale of the liquor license could not be consummated without the consent of the Department of Alcoholic Beverage Control. The Department, under Business & Professions Code, Section 24049, demanded the payment of the said state taxes as a condition precedent to the transfer of the license. These taxes were deducted from the moneys paid by the purchaser and the balance preserved. There was no realizable asset for the benefit of creditors and the labor claimants *until the license was sold* and the license could not be sold without first paying the demand of the Department for state taxes.

The sole "asset," other than merchandise and supplies of the business which were sold for \$960.05 [Tr. of R. p. 9], herein was a document called a liquor license which permitted the *named licensee* to sell alcoholic beverages in the State of California. The piece of paper had no intrinsic value apart from the right to sell alcoholic beverages, which it represented. In order to realize a value for creditors of the Estate, the license had to be sold. Inasmuch as the "license" would carry no rights until the transferee became the *named licensee*, the license could have no value without the consent to transfer by the Department. Here, the Department demanded the payment of state taxes as a condition precedent to the transfer of the license under Business & Professions Code, Section 24049. Without paying the state taxes, there could be no transfer of the license and no sale and no money for anyone; consequently, the question of *priority* of creditors claims to the assets of the insolvent estate is subordinate to the determination of what funds or property are actually *assets* of the Estate. Inasmuch as the Department, pursuant to Business & Professions Code, Section 24049, demanded payment of state taxes as a condition precedent to transfer of the license, *only* that fund consisting of the *sales price minus the amount of state taxes* could be an "asset" of the estate for creditors.

The rationale of the Department's position is obvious. If the state permits an individual to sell alcoholic beverages, payment of state taxes arising from the operation of the liquor business is a condition of the permission and, in fact, constitutes a deductible item *at all times*, due and payable from the inception of the licensed business, from the sale price of the license. Thus, the value

of the liquor license at any time after its issuance can only be the price to be paid therefor minus the amount of state taxes which have accrued to that date. The "proceeds of the sale" of the liquor license could never exceed the sale price *minus* the state taxes.

The Assignee, acting as agent for the Assignor only takes those rights, duties or obligations which his assignor had at the time with the Department of Alcoholic Beverage Control. Inasmuch as the assignor could not have voluntarily transferred the license to a third person prior to the Assignment without paying the demands of the Department of Alcoholic Beverage Control, the Assignee acquired, and could only acquire, the piece of paper titled "liquor license" impressed with the obligation to pay the demands of the State of California, Here, the sale price of the license was \$5800 and the state taxes totalled \$3401.38; therefore, the maximum amount which the Assignee could have held for the benefit of creditors arising from the license, at any time, was the sum of \$2398.62. [Tr. of R. p. 41].

The foregoing principles relating to the transfer and sale of the liquor license and its prospective value to the Estate would apply with like force and effect to a Trustee in Bankruptcy.

III.

There Is No Legal Basis for the Assignee to Resist the Demands of the Department to Pay the State Taxes as a Condition Precedent to the Transfer of the License Because Such Demand Was Proper, Lawful and Reasonable Under Business and Professions Code, Section 24049. The Assignee Should Not Be Surcharged Where He Obtained the Maximum Possible Fund for Creditors From the Sale of the License.

Appellees contend (Appellees' Brief pp. 21, 22 and 23) that the Assignee was remiss in the administration of the insolvent Estate; and, further (Appellees' Brief p. 21), that the labor claimants were the "principal beneficiaries" of the Estate and, "were entitled to the full proceeds which *Meyer received* for the on-sale liquor license." However, the Assignee only *received* the difference between the sale price of the license minus the state taxes required to be paid by the Department of Alcoholic Beverage Control. Appellees would impose a "trust" on the Assignee in favor of the wage claimants on property which was never a part of the Estate and over which the Assignee had no control. This cannot be done.

Appellees state (Appellees' Brief p. 22) that the Assignee "was under a legal duty to resist" the demand of the Department of Alcoholic Beverage Control and could have done so by litigating the matter by using the writ of mandamus. Appellees cite the cases of *Covert v. State Board of Equalization*, 29 Cal. 2d 125 and *Irvine v. State Board of Equalization*, 40 Cal. App. 2d 280, as authority for this proposition. Both of these cases involved the use

of the writ of mandate with reference to appealing the cancellation or revocation of liquor licenses. Neither of these cases are authority for the proposition that the Assignee could use a Writ of Mandate to compel the Department to transfer the license without the payment of the state taxes demanded as a condition precedent to such transfer. Appellees also cite California Government Code, Section 11523, as authority for the Assignee using a writ of mandate in this situation. Government Code, Section 11523, is contained in Chapter 5, of Division 3, of Title 2, of the California Government Code which is titled "Administrative Adjudication." The entire chapter, including Section 11523, deals *solely* with the manner, procedure and review of a *hearing* by an administrative agency to determine whether a right, authority, license or privilege should be revoked, suspended, limited or conditioned (Gov. Code, Secs. 11500-11528). The writ of mandate set forth in Government Code, Section 11523 is *solely* for the purpose of obtaining judicial review of a decision by an agency concerning the licensing of an entity and does not, in any manner, apply to the case at bar.

In fact, there is no legal authority whatsoever for Appellees' contention that the Assignee could have resisted the imposition by the Department of the payment of the state taxes, admittedly due, owing and unpaid, as a condition precedent to the transfer of the liquor license. The Department has been granted the authority to compel the payment of these taxes as a condition precedent to the transfer of the license by the legislature in Business &

Professions Code, Section 24049 and the Assignee had no choice under the circumstances other than to submit to the Department's lawful and proper demands for payment. There was, and is, no legal basis for objecting or resisting the Department's demand inasmuch as the law (Bus. & Prof. Code, Sec. 24049) specifically conferred upon the Department the power and right to so do.

Appellees argue (Appellees' Brief p. 23) that, "it must be assumed that the Department was not cognizant of the existence of the wage liens." Appellees (Appellees' Brief pp. 22-23) come to this conclusion from the fact that the Department insisted upon payment of the state taxes as a condition precedent to transfer of the license. Appellees also state (Appellees' Brief p. 22) that the record fails to show that the Assignee informed the Department of wage claims and (Appellees' Brief p. 23) that this constituted negligent conduct by the Assignee subjecting him to surcharge. It should be noted that the Findings of Fact [Tr. of R. pp. 39-44] states [Tr. of R. p. 41] that the Department of Employment and Board of Equalization were aware of Appellant's capacity as Assignee of Vensop, Inc., at the time the Department demanded payment of said taxes prior to the transfer of the license. If assumptions are to be drawn which cannot be based on facts disclosed by the record, it would be at least as plausible to assume that the Department was aware and had been notified of the wage claims by the Assignee as Appellees' assumption that the Department had not been appraised of the wage claims by the Assignee. Further, to establish

a breach of duty by the Assignee to support Appellees' position that the Assignee was negligent, the Assignee must have been under a *duty* to inform the Department of the existence of the wage claims. Inasmuch as the Department has never waived its right to demand the payment of state taxes as a condition precedent to the transfer of the license where wage claims were present, the law would not impose a duty on the Assignee to a useless act.

Appellees contend (Appellees' Brief p. 23) that Appellant failed "to secure the maximum possible return" on the sale of the license. Neither Appellant nor the Trustee in Bankruptcy could have realized a sum in excess of the sales price of the license minus the state taxes for the benefit of the creditors of the insolvent estate.

Appellees' have failed to present any authority which would support the proposition that the labor claimants could have received a larger dividend from the insolvent estate than they did receive herein if the Trustee in bankruptcy had sold the license rather than the Appellant.*

Appellees urge, without citing any legal authority therefor, that the Appellant should have obtained a transfer of the liquor license without paying the demand for taxes made by the Department as a condition precedent thereto; although there is no showing of any kind that anyone has yet been able whether acting as an assignee, trustee in bankruptcy, or in any other capacity, to find a method or

*It is reasonable to draw the inference that authority does not exist for the proposition asserted by the Appellees.

device to compel a transfer of a liquor license without complying with the conditions precedent for the payment of existing unpaid taxes. The contention by the Appellees is tantamount to saying that even though the Trustee in Bankruptcy could have realized no greater sum; nevertheless, an Assignee for the benefit of creditors or an agent of the Assignor, is burdened with a greater duty and responsibility.

Respectfully submitted,

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